Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,
Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE

Alliance for Atomic Veterans, Citizen Soldier, Health and Energy Institute, Military Family Support Network, National Committee for Radiation Victims, Natural Rights Center, Nuclear Information and Resource Service, and Veterans Due Process, Inc.

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QUESTIONS PRESENTED

1. Upon this Court's remand to consider the constitutionality of the fee limitation as applied to complex claims, was the District Court free to hear evidence and to make further factual findings relating to these remanded claims? If so, was the Court of Appeals free to ignore those factual findings absent a determination that they were clearly erroneous?

2. Under this Court's standard for measuring procedural due process, plaintiffs must show the *risk* of an erroneous deprivation of a property interest and the *probable value* of additional safeguards. Did the Court of Appeals err by requiring petitioners to show instead:

> — not only a risk of erroneous deprivation, but also that a significant number of petitioners' claims had been wrongly decided?
>
> — not only the probable value of a lawyer's assistance, but also that lawyers are absolutely "necessary" to ensure procedural fairness?

3. Did the Court of Appeals err in treating selected excerpts of "legislative history" to unenacted statutes as supplanting the District Court's specific factual findings regarding the operation of the veterans' benefit claims system as applied to petitioners?

4. Did the Court of Appeals err by refusing to examine petitioners' First Amendment claims under a standard of strict scrutiny that requires that the fee limitation be narrowly tailored to serve a compelling governmental interest?

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BRIEF OF AMICUS CURIAE

SUMMARY OF ARGUMENT

Amici public interest organizations, Alliance for Atomic Veterans, Citizen Soldier, Health and Energy Institute, Military Family Support Network, National Committee for Radiation Victims, Natural Rights Center, Nuclear Information and Resource Service, and Veterans Due Process, Inc., respectfully urge that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 24, 1992. The issues presented on review are timely,

substantial and of great significance to the amici organizations and to the parties and interests which they represent. The parties to the appeal have consented to this filing.

The rationale provided by the district court relied upon the important considerations which underlie the intent of Congress to remove veteran's claims from the Article III courts and to repose them in a system of the Executive Branch. Congress did not intend to remove attorneys from this process, but a century of inflation has accomplished that effect. A century of growing complexity, and increasingly insideous weaponry, capable of inflicting long-term latent injuries, has also created an Article II system in which an attorney is essential to marshall proof and to protect claimants from manifold abuses of the process.

INTEREST OF AMICI

Amici Curiae are eight independent, nonprofit, non-governmental, public interest organizations concerned with and affected by the due process and right to counsel issues raised in this case.

Alliance for Atomic Veterans is a national and international non-governmental association representing radiation-exposed veterans in six countries. Since 1983, the Alliance has served as an advocate for reform of national and international laws restricting the rights of radiation victims to fair compensation for their injuries. Alliance also works for an end to nuclear tests in order to prevent additional damage to future generations. The Alliance has U.S. offices at Box 32, Topock, AZ 86436.

Citizen Soldier is a public advocacy project of Alternatives to Militarism, Inc., a non-profit charity. Citizen Soldier works for the rights of active duty GIs and veterans on issues related to service connected injuries and health problems. Citizen Soldier has, since 1969, provided counseling and assistance to thousands of military veterans in claims before the Veterans Administration and has argued for remedial legislation in Congress. The staff of Citizen Soldier brought national attention to the atomic veteran dilemma with the publication of

the book, *GI Guinea Pigs* in 1980. Citizen Soldier is located at 175 Fifth Ave., New York, NY 10010.

Health and Energy Institute is a public interest research and educational organization, bringing together scientists, educators, policymakers, and citizens to examine and formulate improvements to public policies with respect to ionizing radiation and other environmental dangers. Health and Energy Institute is located at P.O. Box 5357 Takoma Park, MD 20912.

Military Family Support Network represents the interests of active duty GIs and veterans on issues related to injuries and health problems stemming from service in the Persian Gulf during Operations Desert Shield and Desert Storm. The Network successfully urged President George Bush to create a national registry for the some 4,000 veterans suffering from Gulf War Syndrome. The Network provides counseling and assistance to veterans bringing VA claims. The Military Family Support Network is located at PO Box 2047, Buies Creek, NC 27506.

National Committee for Radiation Victims is a congress of representatives of national and international radiation victims and survivors groups and professionals concerned about the health effects of radiation and the rights of victims to receive meaningful relief. Since 1985, NCRV has provided the public education foundation for reform of the VA compensation and pension program and has contributed to the creation of a federal compensation program for Utah downwinders, Navajo uranium miners, and nuclear test site workers. NCRV is located at 6935 Laurel Ave., Takoma Park, MD 20912.

Natural Rights Center is a public interest law project with offices at 556 Farm Road, Summertown TN, 38483. The Center provides representation to a number of veterans in Agent Orange, ionizing radiation and other complex claims before the Veterans Administration regional offices, the Board of Veterans Appeals, the Court of Veterans Appeals and other

adjudicatory bodies.[1] The Center brought the first successful claim for service connection related to Agent Orange exposure and has provided free attorney representation for more atomic veterans than any other public interest law project. The Center also actively represents the interests of its members in governmental actions having significant constitutional and human rights implications.

Nuclear Information and Resource Service is a non-profit educational organization focusing on nuclear power and energy alternatives, nuclear waste, radiation and health. NIRS comprises a coalition of individuals and local action organizations concerned about our nation's environmental future. NIRS is located at 1424 16th St., Washington DC 20036.

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[1] The Center presently represents one radiation claimant whose decedent initiated his first VA claim for injuries secondary to radiation exposure in 1947. This claim has been in active, attorney-represented litigation before the VA since 1980, and has involved well in excess of 2,800 hours of attorney and expert time for work which has included military archival research, plutonium bone and tissue assay, two independent dose reconstructions, Freedom of Information Act requests, petitions to revise VA regulations, testimony to scientific review boards, and multiple hearings at all levels of the VA process before reaching its present stance of a Court-ordered stay before the Court of Veterans Appeals. In a second case by way of example, the Center represents an Air National Guardsman exposed during Operation Plumbbob in 1957. This claim has been in active, attorney-represented litigation before the VA since 1979, and has involved well in excess of 2,200 hours of attorney and expert time for work which has included military archival research, epidemiological study by the National Centers for Disease Control and Prevention, one official and two independent dose reconstructions, two dose reconciliations by outside consultants to the Department of Veterans Affairs, testimony to scientific review boards, and multiple hearings at all levels of the VA process before reaching its present stance of submission to the Board of Veterans Appeals in October, 1991. The extensive attorney assistance provided in these and many other exceedingly complex claims was provided free of charge to the claimants and paid for by donations to the Center from concerned individuals and charitable foundations as well as the donated time of several attorneys, student interns and paralegal professionals.

Veterans Due Process, Inc. is a non-profit veterans' rights organization based at P.O. Box 68237, Portland, OR 97268. For the past decade, VDP has attempted to halt the erosion of veterans rights to fair access to medical care and disability compensation. Since the passage of the Econo..y Act in 1933, 28 U.S.C. § 211a, service-connected tort claims have been the sole province of the VA system. VDP has historically served as a bulwark to insure that the VA system is kept fair and that administrative decisions are ultimately and effectively subject to review by a fair and impartial judiciary.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A SIGNIFICANT MISCONSTRUCTION OF THE DECISION OF THIS COURT WHICH, IF SUSTAINED, WILL IMPOSE FAR-REACHING LIMITATIONS UPON THE RIGHTS OF VETERANS TO RECEIVE FAIR AND MEANINGFUL ADJUDICATION OF BENEFIT CLAIMS

When the Cold War ended, there were no ticker-tape parades in the cities of America. Still, the heroes of America's longest war knew who they were. They were the tank commanders in West Germany, the watchtower sentries in South Korea, and the airmen in missile silos in Wyoming. If Purple Hearts had been awarded to all the wounded, the single largest group would have been the 233,000 servicemen whose bodies were wounded by atomic radiation: the men and women who put their bodies on the line in the defense of freedom through credible nuclear deterrence.

All those wounded men and women have ever asked in return is for fair and equal treatment with their compatriots who have borne wounds in service to their country. Because their claims are at the very frontier of science, however, such compensation is seldom forthcoming. The appellant class members in this case argue that the $10.00 fee limit, as applied to Service Connected Death and Disability ("SCDD") claimants whose claims are based on exposure to ionizing radiation and who are not covered by the Veterans' Judicial Review Act of 1988, violates due process and the First Amendment because it deprives claimants of a meaningful opportunity to present their

claims to the Veterans Administration ("VA") and to petition the government.

After considering the merits of this claim, the district court held that the $10.00 fee limitation on attorneys' fees imposed by 38 U.S.C. §§ 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905) is unconstitutional as applied to claims for benefits based on exposure to ionizing radiation. *National Ass'n of Radiation Survivors v. Derwinski*, 782 F.Supp. 1392 (N.D. Cal. 1992).[2]

The rationale provided by the district court was founded upon a number of considerations. Ionizing radiation ("IR") claimants are generally poor, and in the cases of veterans themselves, almost always in poor health. *Id.*, (in petitioners' Appendix to the Petition for Certiorari at 115, herein "a-115"). Moreover, veterans' law encompasses an extraordinarily complex body of statutes, regulations, and other materials. (*Id.* at a-115-116). The competent use of these materials is a high-skilled task. (*Id.* at a-116). For IR claims in particular, the claim development process is far more detailed and complex than that for other SCDD claims. (*Id.* at a-117, a-120-122). The typical medical issues are far more complex than the average claimant, having less than a high school education, is generally capable of understanding, not to mention developing. (*Id.* at a-119).[3]

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[2] In *National Ass'n of Radiation Survivors v. Walters*, 473 U.S. 305, 105 S.Ct. 1380, 87 L.Ed.2d 220 (1985) (*"NARS I"*), this Court declined the opportunity to reach a decision as to whether applicants for SCDD benefits possessed a protected property interest in those benefits. In the absence of that guidance, it is now assumed in many jurisdictions that an applicant for disability benefits has a property interest in those benefits. *See, e.g.: Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). The district court below concluded that these appellants, *as applicants*, possess a property interest protected by the Constitution. *National Ass'n of Radiation Survivors v. Walters*, 589 F.Supp. 1302 at 1313-14 (N.D. Cal. 1984); *National Ass'n of Radiation Survivors v. Derwinski*, 782 F.Supp. 1392 (N.D. Cal. 1992).

[3] Said the district court:

continued...

The record indicates that the factual development of IR claims conducted by VA regional offices is extremely limited. An abstract of a random selection of 674 IR claims files introduced at trial indicates that no dose estimate was obtained by the VA regional office in fifty-nine percent of IR cases and that no physical exam was conducted in forty-eight percent of the claims. (Ex. 461). In 509 of these cases the VA performed no independent factual development due to the complicated nature of IR claims and to the fact that the VA's "work product" schedule does not provide additional work credits for IR claims. (Ex. 458). Thus, as the district court found, there is an institutionalized incentive to underprepare the IR claims. (a-132).

Recent decisions of the Court of Veterans' Appeals ("CVA") in cases involving complex claims[4] illustrate that the problems the district court identified remain evident, even after the enactment of the Veterans' Judicial Review Act of 1988 ("VJRA"), Pub.L.No. 100-687, 102 Stat. 4105 (1988). These

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"In light of the complexity of the medical issues involved, disagreement in the medical field with regard to cancer causation issues and the health

Note 3, continued...

> effects of low level exposure to ionizing radiation, the difficulty of disease classification and of discerning disease manifestation periods, and conflicting evidence regarding the validity of radioepidemiological tables employed by the VA and of other epidemiological data available in the field, the court finds that proper presentation and adjudication of IR claims will often require the marshalling of expert medical opinion and testimony."

National Ass'n of Radiation Survivors v. Derwinski, at a-122-123.

> "The court further finds, based on the evidence demonstrating the complexity of radiation dose reconstruction and the disagreements in the field concerning the validity of film badge data and the development and application of dose reconstruction methodology, that adequate presentation and adjudication of IR claims will generally require marshalling expert scientific and medical evidence in complex and disputed areas of the fields implicated."

Id. at a-128.

[4] Cases involving, for example, claims based on exposure to ionizing radiation, exposure to Agent Orange, and post traumatic stress disorders.

decisions underscore the importance of counsel at the early stages of the VA claims process.

The CVA frequently has found, for instance, that the VA failed to perform its statutory duty of assisting unrepresented veterans.[5] If veterans were allowed to retain counsel, they would not have to rely for support on an institution with a proven record of failing to assist them in developing the facts pertinent to their claims. Developing the factual basis for claims earlier in the process would likely result in those claims being addressed on their merits sooner and reduce the number of appeals taken. The VA adjudication system today, much as when this case was tried in 1988, frequently denies veterans with complex claims their procedural and substantive rights.

Recent CVA decisions also reflect that the Board often ignores controlling statutes and its own regulations.[6] Even when following regulations, the Board often bases its decisions on its own unsubstantiated conclusions rather than

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[5] *See, e.g.: DiBenedetto v. Brown*, 4 Vet. App. ___, 1993 Vet App. LEXIS 404 (July 13, 1993); *King v. Brown*, 4 Vet. App. 519 (1993); *Ascherl v. Brown*, 4 Vet. App. 371 (1993); *Booth v. Brown*, 4 Vet. App. 280 (1993); *Culver v. Derwinski*, 3 Vet. App. 292 (1992); *Trytek v. Derwinski*, 3 Vet. App. 153 (1992); *Schfrath v. Derwinski*, 1 Vet. App. 589 (1991); *Ashmore v. Derwinski*, 1 Vet. App. 580 (1991); *Sagainza v. Derwinski*, 1 Vet. App. 575 (1991); *Parker v. Derwinski*, 1 Vet. App. 522 (1991); *White v. Derwinski*, 1 Vet. App. 519 (1991); *Hanson v. Derwinski*, 1 Vet. App. 512 (1991); *Godwin v. Derwinski*, 1 Vet. App. 419 (1991); *Travelstead v. Derwinski*, 1 Vet. App. 344 (1991); *Karnas v. Derwinski*, 1 Vet. App. 308 (1991); *Morris v. Derwinski*, 1 Vet. App. 260 (1991); *Hyder v. Derwinski*, 1 Vet. App. 221 (1991); *Wood v. Derwinski*, 1 Vet. App. 190 (1991); *Corchado v. Derwinski*, 1 Vet. App. 160 (1991); *Myers v. Derwinski*, 1 Vet. App. 127 (1990); *Green v. Derwinski*, 1 Vet. App. 121 (1990); *Akles v. Derwinski*, 1 Vet. App. 118 (1991); *Littke v. Derwinski*, 1 Vet. App. 90 (1990); *Murphy v. Derwinski*, 1 Vet. App. 78 (1990); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); *Jolley v. Derwinski*, 1 Vet. App. 37 (1990).

[6] *See, e.g.: Servello v. Derwinski*, 3 Vet. App. 196 (1992); *Cosman v. Principi*, 3 Vet. App. 503 (1992); *Hohol v. Derwinski*, 2 Vet. App. 169 (1992); *Douglas v. Derwinski*, 2 Vet. App. 103 (1992); *Sawyer v. Derwinski*, 1 Vet. App. 103 (1991); *Fugere v. Derwinski*, 1 Vet. App. 103 (1990); *Bentley v. Derwinski*, 1 Vet. App. 28 (1990).

on the evidence before it.[7] In one IR claim, the Board discarded the standard of proof established by Congress for dismissing radiation claims—"no reasonable possibility" of service-connection—and inserted its own "absence of probability"—standard to make the burden more difficult for the claimant. *Sawyer v. Derwinski*, 1 Vet. App. 103 (1991). These problems would be alleviated to a great degree if attorneys were available earlier in the process to brief the often complex issues before the Board. Veterans raising complex claims *pro se*, generally without the benefit of legal training and almost invariably suffering from debilitating diseases, are left without guidance when the Board disregards the law. Often such veterans are incognizant of their legal position; rarely are they able to prepare the legal arguments necessary to persuade the Board to follow the law or to challenge the lack of evidentiary basis for Board decisions.

When this Court last examined the veterans' appeals process, it found that the process was "designed to function throughout with a high degree of informality and solicitude for the claimant." *NARS I, supra*. The number of cases now being disposed of by the Board and the CVA on procedural and jurisdictional grounds belies this conclusion.[8] The VA

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[7] *See, e.g.: Romeo v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 338 (August 6, 1993); *Mee v. Brown*, 4 Vet. App. 220 (1993); *Cosman v. Principi*, 3 Vet. App. 503 (1992); *Cleary v. Principi*, 3 Vet. App. 495 (1992); *Hatlestad v. Derwinski*, 3 Vet. App. 213 (1992); *Williams v. Brown*, 4 Vet. App. 270 (1993); *Watson v. Brown*, 4 Vet. App. 189 (1993); *Stein v. Derwinski*, 2 Vet. App. 517 (1992); *Philbrickv. Derwinski*, 2 Vet. App. 466 (1992); *Fisher v. Derwinski*, 2 Vet. App. 406 (1992); *Murincsak v. Derwinski*, 2 Vet. App. 363 (1992); *Sheed v. Derwinski*, 2 Vet. App. 255 (1992); *Crandall v. Derwinski*, 2 Vet. App. 113 (1992); *Cousino v. Derwinski*, 1 Vet. App. 536 (1991); *Colvin V. Derwinski*, 1 Vet. App. 171 (1991); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

[8] The effect of not having attorneys to guide claimants through the often arcane casuisteries of the IR claims process is clear from the number of cases reaching appellate courts with insufficient development or attention to procedural and jurisdictional prerequisites. *See, e.g.: Waddell v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 457 (September 7, 1993); *Ephraim v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 465 (September 16, 1993); *Abernathy v. Principi*, 3 Vet. App. 461 (1992);

appears to be relying increasingly on formality as a tool to manage its growing appellate caseload. So, for instance, a 100-percent service-connected psychiatrically disabled veteran—with diminished mental capacity to deal with matters pertinent to his claim—had his appeal dismissed because a VA official assisting the claim missed a filing deadline. *Roy v. Brown*, 4 Vet. App. ___, 1993 Vet. App. LEXIS 506 (September 24, 1993). This is not an isolated incident. Claimants now more than ever require attorneys to guide them through the legal obstacles posed by increasingtly complicated VA regulations and CVA decisions.

Contrary to the pre-trial supposition of this Court in *NARS I*, the just cited cases, as well as the two month trial before the district court, demonstrated that the mass of claims processed by the Veterans Administration *does* incorporate high probability of error. *NARS v. Derwinski* at a-134; *and see:* Abrams, Complex Statutory Scheme Creates Heartache and Heartbreak for Radiation Claimants, *The Veterans Advocate*, 4:8:61-66 (April, 1993).

In light of the complex medical and scientific issues involved, the difficulty of obtaining appropriate records, and the limited ability of a lay-claimant or service representative to comprehend the relevant issues, the trial court found that the right to retain counsel was the only means available to provide claimants effective representation.

The government argued before this Court in 1984 that the non-adversarial adjudication system serves to safeguard claimants' interests. Instead, the district court found that the VA's adjudication of IR claims is more accurately characterized as adversarial.[9]

Drenkhahn v. Derwinski, 2 Vet. App. 207 (1992); *DiDonato v. Derwinski*, 2 Vet. App. 42 (1992); *Sudranski v. Derwinski*, 1 Vet. App. 457 (1991); *Magula v. Derwinski*, 1 Vet. App. 76 (1990); *Strott v. Derwinski*, 1 Vet. App. 114 (1991); *Doub v. Derwinski*, 1 Vet. App. 17 (1990); *Skinner v. Derwinski*, 1 Vet. App. 2 (1990).

[9] Said the district court:

"The record is replete with examples of the VA's lack of solicitude for IR claims and agency behavior that demonstrates a disregard for the procedural

There is no safety in assuming that charitable services can fill the void and provide any better representation. As the district court observed,

> While service representatives undoubtedly are well-intentioned, their "crushing" caseloads make effective representation of claimants with complicated IR claims virtually impossible. Ex. 70. For example, the Disabled American Veterans employed ten appeals-level service representatives who handled 17,954 claims in Fiscal Year 1986; the two representatives of the AmVets presented 1304 claims to the BVA the same year. RT at 1780-82, Ex. 263.
>
> Training of service representatives is very limited, and they receive no specialized training in the intricacies of IR claims. RT at 1174-75,1177. As a result, service representatives often do not detect errors in VA denials of IR claims. RT at 11 78-83.

Note 9 continued...
and substantive rights of IR claimants. *See, e.g.*, RT at 1086-94. For example, there is evidence that the VA actively discourages IR claimants from invoking their right to a hearing where they could more fully present their claims, provide expert medical and scientific testimony and respond to rating board concerns. Ex. 18 at 11,17 at 137-39,1042. Personal hearings are held in only 5.69% of IR claims. In less than one percent of the cases are those hearings held prior to the VA's initial determination. RT at 250. IR claimants are discouraged from requesting hearings despite the fact that the evidence shows that those claimants who have hearings have a substantially higher success rate than those who do not. RT at 248-50.

"The record indicates that, either by design or neglect, the VA has operated in such a manner so as to frequently put the claimant at a disadvantage in the adjudication process. Materials important to development of an IR claim often are not made available at VA regional offices. RT at 258. The vast array of materials, General Counsel opinions, and other documentation relevant to IR claims are not indexed so as to make them accessible to a lay-claimant. *Id.* And pattern letters sent to the IR claimant solicit information adverse to the claim without requesting information tending to prove it."
Id. a-132-133.

In addition, the evidence shows that service representatives do little in the way of fact development for IR claims, instead relying almost exclusively on the claimant to marshal the complicated array of materials and information necessary to successfully present a claim. RT at 1107:23-1108:5,1704:22-1707:2,1712. For example, service representatives rarely obtain independent medical exams for claimants. RT at 1706. Worse yet, it appears that in most cases service representatives do not meet with the claimant before a rating decision is made. RT at 1708.

Service representatives rarely request a hearing for the claimant before the rating board and often discourage veterans from requesting a hearing prior to denial of the claim by the regional office. RT at 1150,1730, Ex. 236. The record suggests that in those instances where a service representative does obtain a hearing for the claimant and represents the claimant, the representative often does not perform effectively as an advocate. RT at 1149-50,1160-65,1736. Frequently, the representative meets with the claimant for the first time one hour prior to the hearing. RT at 1149.

The evidence also indicates that service representatives are not an effective safeguard in appeals of claim denials before the BVA. Service representatives frequently fail to notify claimants of their right to appeal, and as a result, claimants often fail to exhaust their administrative remedies. RT at 1714. Where the claimant is advised of his or her right to appeal, in most cases the claimant fills out the substantive appeal form without the assistance of the service representative. RT at 1159-60,1724. This occurs despite the fact that the claimant is deemed to accept any factual finding in the Statement of the Case not disputed in the substantive appeal form. Service representatives rarely request hearings on behalf of the IR claimant before the BVA. RT at 1733. Appeals briefs prepared by service representatives are often inadequate. RT at 1158.

In sum, the evidence strongly suggests that there is little difference in quality between claims prepared solely by the IR claimant and those prepared with the assistance of a

> service representative. RT at 1169. The deleterious effects of the service representatives' almost total reliance on the claimant is magnified by the fact that the average veteran claimant has only an eleventh grade education. Ex. 461.

a-134-135.

Based on the evidence presented at trial, the district court found unequivocally that attorneys would perform far better than volunteer service representatives in other areas which are key to proper presentation of an IR claim. (a-136). Indeed, IR claimants who have received the benefit of attorneys have had 2400% higher success rates than those have not.

This Court has previously recognized the possibility that the fee limitation might be found unconstitutional as it applied to "some discrete class of complex cases." *NARS I,* 473 U.S. at 337,105 S.Ct. at 3198. The cautious analysis of the district court's opinion amply demonstrates that, because of the extreme complexity of governing law, applicable procedures, medical and scientific issues, and necessary factual development, IR claims are exceptionally complex and are thus distinguishable from those of the typical VA benefits claimant.

This Court, in reversing the preliminary injunction, found that the rationale for the limitation was

> that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.

Id. at 321, 105 S.Ct. at 3189. Fearing that "destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible" and that the VA adjudication system would be "rendered more adversary and more complex by the very presence of lawyer representation," the Court accorded great weight to the government interest. *Id.* at 326, 105 S.Ct. at 3191.

Chief Justice Rehnquist's analysis implies that the real goal of the fee limitation was to prevent attorneys from participating in the adjudication of veterans' benefit claims, since only this would realize the governmental interest identified by the Court, i.e., preserving the "simple" nature of the procedures by keeping attorneys out. In fact, as Justice Stevens pointed out in his dissent in *NARS I*, the purpose of the fee limitation when enacted was not to prevent the employment of reputable counsel but instead to protect veterans from unscrupulous lawyers. 473 U.S. at 360, 105 S.Ct. at 3210 (Stevens, J., dissenting). A $10 fee in 1862, the year the fee limitation was enacted, was roughly equivalent to a $580 fee today. *Id.* at 361,10; S.Ct. at 3210. Thus, the fee limitation initially *allowed* for the employment of an attorney by a veteran claimant, while the fee limitation at present *does not.*

The handicap that the ongoing legal construction has provided is a legacy of waste and inefficient use of scarce judicial resources. Fully 65 percent of cases reaching the Court of Veterans Appeals are filed *pro se*, a situation which Chief Judge Frank Nebeker has termed "a serious problem which adversely affects this Court, the community of our nation's veterans, and the achievement of the goals which prompted the 100th Congress to institute judicial review of veterans' benefits decisions."[10] A similar problem has confronted the Board of Veterans Appeals, which will only issue some 27,600 decisions this year, down from 45,308 in 1991, despite a rise in the number of cases docketed. The average response time at the BVA has risen from 139 days in 1991, to 240 days in 1992, to 441 days in 1993, an escalating delay factor which the Secretary of Veterans Affairs ascribes to the increasing complexity of the "evolving body of case law" emanating from VJRA.[11] The Secretary's solution is to ask Congress for millions of additional tax dollars to help BVA deal with all of these *pro se* claimants. A simpler and more straightforward solution would be to permit these claimants to exercise their right to retain counsel.

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[10] Letter, Frank Nebeker to Alan Cranston, October 23, 1991.

[11] Letter, Jesse Brown to Thomas S. Foley, August 13, 1993.

As Justice Stevens reminds us,

> "[T]he citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless. It should not be bargained away..."

a-89.

CONCLUSION

For the reasons described in the foregoing, the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that true copies of the foregoing have been served upon Counsel for the Parties by first class mail, postage prepaid, this 14th day of October, 1993.

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